IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1177

AUBREY SCOTT,

Petitioner,

vs.

THE STATE OF ILLINOIS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

BRIEF FOR THE STATE OF ILLINOIS IN OPPOSITION TO THE PETITION

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OPINIONS BELOW

The opinion of the Supreme Court of Illinois affirming Petitioner's conviction is reported at 68 Ill. 2d 269, 369 N.E. 2d 881. The opinion of the Appellate Court of Illinois, First District, is reported at 36 Ill. App. 3d 304, 343 N.E. 2d 517.

JURISDICTION

The decision of the Supreme Court of Illinois was entered on October 5, 1977. The Petition for Rehearing was denied by that court on November 23, 1977. The jurisdiction of this Court is properly invoked under 28 U.S.C. § 1257(3) as to question No. 1 only. (See Reasons for Denying the Writ at Point II., infra.)

QUESTIONS PRESENTED

1. Whether a misdemeanant whose conviction results solely in a small fine has a constitutional right to appointed counsel at state expense.

2. Whether this Court should grant a Writ of Certiorari when a petitioner claims that he has been denied a fair trial, although he failed to raise or argue that issue in either state court of review and failed to allege in this Court that a specific error was committed at trial.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Amendment VI:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crim. shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining his defense.

United States Constitution, Amendment XIV, Section 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Ill. Rev. Stat. ch. 110A, § 612(j) (1971):

> The following civil appeals rules apply to criminal appeals insofar as appropriate:
> (j) Contents of briefs: Rule 341.

Ill. Rev. Stat. ch. 110A, § 341(e)(7) (1971):

> The appellant's brief shall contain the following parts in the order named:
>
> > Argument, which shall contain the contentions of the appellant and the reasons thereof, with citation of the authorities and the pages of the record relied on . . . Points not argued are waived and shall not be raised in the reply brief, in oral argument, or on petition for rehearing.

STATEMENT OF THE CASE

On January 31, 1972, Petitioner Aubrey Scott appeared *pro se* in the Municipal Court of Cook County. After being informed that he was charged with misdemeanor theft, Petitioner responded to a question by the court by stating, "I am ready for trial." Petitioner then plead not guilty to the charge and waived his right to a jury trial.

The sole witness for the People, William Bray, was a security guard for S. W. Woolworth in the City of Chicago. Mr. Bray testified that on January 19, 1971, he observed Petitioner ask a Woolworth salesgirl to unlock several attache cases. For the next 15 to 20 minutes, Petitioner walked around the store with the attache case and a $10.00 bill. During this time, Petitioner picked up an address book and put it in his pocket, Mr. Bray testified. Mr. Bray further stated that Petitioner then walked out of the store with the attache case. When Mr. Bray placed Petitioner under arrest outside the store, Petitioner said that the case belonged to him.

Petitioner testified on his own behalf at trial. Petitioner said that he had placed items in the case to see if it was the proper size. Petitioner had almost $300.00, he testified, and was trying to find a salesgirl at the time he was arrested. Petitioner further testified that he was arrested while still inside the store. The Assistant State's Attorney did not cross-examine Petitioner or present rebuttal testimony.

After hearing the evidence presented by Petitioner, the court stated, "I don't believe you, sir. Finding of guilty." The trial court subsequently fined Petitioner $50.00 for the misdemeanor violation.

Petitioner then appealed to the Appellate Court of Illinois, claiming that the federal constitution and the Illinois statutes provide a right to appointed counsel for misdemeanants who are fined upon conviction. The appellate court determined that constitutional and statutory law only require appointment of counsel in misdemeanor cases that result in imprisonment. Petitioner then appealed to the Illinois Supreme Court, which similarly rejected both of Petitioner's contentions. The Illinois Supreme Court subsequently denied a petition for rehearing in this case.

REASONS FOR DENYING THE WRIT

I.

ALTHOUGH PETITIONER CONTENDS THAT FEDERAL AND STATE COURTS ARE CONFUSED AND DIVIDED ON WHETHER THE FEDERAL CONSTITUTIONAL RIGHT TO APPOINTED COUNSEL EXTENDS TO MISDEMEANANTS WHO ARE FINED, BUT NOT IMPRISONED, A CAREFUL READING OF THE CASE LAW DEMONSTRATES A CLEAR UNDERSTANDING BY THE COURTS THAT THE CONSTITUTION DOES NOT REQUIRE APPOINTMENT OF COUNSEL AT STATE EXPENSE FOR MISDEMEANANTS WHO ARE NOT DEPRIVED OF THEIR LIBERTY.

As this Court stated in *Argersinger* v. *Hamlin*, 407 U.S. 25, 40, 92 S. Ct. 2006, 2014 (1972), counsel must be provided in misdemeanor cases "that end up in the actual deprivation of a person's liberty." Conforming to the *Argersinger* ruling, three circuits of the United States Court of Appelas have expressly held that the right to appointed counsel attaches only if imprisonment is in fact

imposed. *United States* v. *White,* 529 F. 2d 1390 (8th Cir. 1976); *Marston* v. *Oliver,* 485 F. 2d 705 (4th Cir. 1973); *Henkel* v. *Bradshaw,* 483 F. 2d 1386 (9th Cir. 1973). In addition, three other circuit courts have recognized that a misdemeanant who is merely fined is not constitutionally entitled to appointed counsel. *In re Di Bella,* 518 F. 2d 955, 957, 957, 959 (2d Cir. 1975); *United States* v. *Sawaya,* 486 F. 2d 890, 892 (1st Cir. 1973); *Sweeten* v. *Sneddon,* 463 F. 2d 713, 715-716 (10th Cir. 1972). Only the United States Court of Appeals for the Fifth Circuit has based the right to appointed counsel upon the statutory sentencing alternatives in misdemeanor cases. *Thomas* v. *Savage,* 513 F. 2d 536 (5th Cir. 1975). In announcing its rule, however, the court demonstrated its clear understanding that this extension was not constitutionally mandated, stating:

> In this respect the cases of this circuit go beyond the Supreme Courts decision in *Argersinger* v. *Hamlin* . . . which would only require the appointment of counsel when a sentence of imprisonment is imposed. *Id.* at 537.

Thus, every federal circuit court that has commented upon this issue has recognized that the Constitution does not require appointment of counsel in misdemeanor cases in the absence of a deprivation of liberty.

Similarly, no extensive division or confusion on this issue exists in the federal district courts. Several district courts have refused to extend the right to appointed counsel to misdemeanants who suffer no loss of liberty. *Barr* v. *United States,* 415 F. Supp. 990 (W.D. Okla. 1976); *Scott* v. *Hill,* 407 F. Supp. 301 (E.D. Va. 1976); *Linkous* v. *Jordan,* 401 F. Supp. 1175 (W.D. Va. 1975). In dictum, five district courts have stated that imprisonment triggers the constitutional right to appointed counsel for misdemeanants. *Karr* v. *Blay,* 413 F. Supp. 579, 586 (N.D. Ohio 1976); *Vail* v. *Quinlan,* 406 F. Supp. 951, 960 (S.D.N.Y. 1976); *La Bar* v. *Goodman,* 397 F. Supp. 463, 464 (W.D.N.C. 1975); *Abbit* v. *Bernier,* 387 F. Supp. 57, 62-63 A. 12 (D. Conn. 1974); *Lessard* v. *Schmidt,* 349 F. Supp. 1078, 1098 (E.D. Wis. 1972), *vacated another grounds and remanded,* 421 U.S. 957, 95 S. Ct. 1943 (1975), *judgment reinstated,* 413 F. Supp. 1318 (1976). Only one federal district court has exceeded the scope of *Argersinger.* In *Gilliard* v. *Carson,* 348 F. Supp. 757, 761-762 (MD. Fla. 1972), a suit for injunctive relief seeking appointment of counsel in misdemeanor cases, the court noted that the defendant municipality persistently violated the *Argersinger* mandate. The court stated:

> This Court holds that these clear rights are being violated with the result that many citizens are being unlawfully deprived of their personal liberty. The Court concludes further that there is imminent danger that members of the class of indigent citizens facing prosecution in the Municipal Court will similarly have their clearly established constitutional rights violated and suffer irreparable harm by being unlawfully deprived of their personal liberty. *Id.*

The court in *Gilliard* did not purport to expand the right to counsel, only to guarantee the right as this Court announced it in *Argersinger.* In light of an imminent danger of deprivation of liberty to a large number of defendants, the court required appointment of counsel in all cases in the municipality as an extraordinary remedy for the repeated flagrant violation of *Argersinger.* Moreover, the court demonstrated no confusion as to the law since it recognized that the denial of counsel merely precludes the imposition of a jail sentence. *Id.* at 761.

No state court has said that the federal constitution requires appointment of counsel for misdemeanants who are fined. Indeed, thirteen states besides Illinois have expressly held that appointment of counsel is not required for misdemeanants who are not sentenced to jail. *State* v. *Sanchez,* 110 Ariz. 214, 516 P. 2d 1226 (1973); *Rollins* v. *State,* 299 So. 2d 586 (Fla. 1974); *Johnston* v. *State,* 236 Ga. 370, 223 S.E. 2d 808 (1976); *Mahler* v. *Birnbaum,* 95 Idaho 14, 501 P. 2d 282 (1972); *Commonwealth* v. *Boudreau,* 285 N.E. 2d 915 (Mass. 1972); *Nelson* v. *Tullos,* 323 So. 2d 539 (Miss. 1975); *People* v. *Farinaro,* 36 N.Y. 2d 283, 326 N.E. 2d 819, 367 N.Y.S. 2d 258 (1975); *Whorley* v. *Commonwealth,* 215 Va. 740, 214 S.E. 2d 447 (1975); *State* v. *Francis,* 85 Wash. 2d 894, 540 P. 2d 421 (1975); *State* v. *Camp,* 326 So. 2d 644 (La. App. 1976); *State* v. *McGrew,* 127 N.J. Super. 327, 317 A. 2d 390 (1974); *State* v. *Ross,* 304 N.E. 2d 396 (Ohio App. 1973); *Aldrighetti* v. *State,* 507 S.W. 2d 770 (Tex. App. 1974). In addition, eight other state courts have interpreted the federal constitutional right to appointed counsel consistent with *Argersinger's* loss of liberty limitation. *Alexander* v. *State,* 258 Ark. 633, 527 S.W. 2d 927 (1975); *Lindh* v. *O'Hara,* 325 A. 2d 84 (Del. 1974); *State* v. *Giddings,* 216 Kan. 14, 531 P. 2d 445 (1975); *People* v. *Studaker,* 387 Mich. 698, 199 N.W. 2d 177 (1972); *State ex rel. Kansas City* v. *Meyers,* 513 S.W. 2d 414 (Mo. 1974); *Kovarik* v. *County of Banner,* 192 Neb. 816, 224 N.W. 2d 761 (1975); *Nicholson* v. *State,* 56 Ala. App. 3, 318 S. 2d 744 (1975); *Rassmussen* v. *State,* 18 Md. App. 443, 306 A. 2d 577 (1973). Thus, Petitioner's assertion that extensive division and confusion exists in the lower courts is unfounded.

Petitioner's misapprehension of the case law is based in part upon his reliance upon quotations taken out of con-

text regarding defendants who are "subject to possible imprisonment" or "in cases which may result in imprisonment." (Pet. 7, 8) In attempting to support his position, Petitioner erroneously interprets these phrases as referring to statutory sentencing alternatives rather than the prosepect of imprisonment arising from the trial court's predictive evaluation. As Chief Justice Burger stated in *Argersinger,* when a trial court engages in the predictive evaluation authorized by *Argersinger,* it determines the possibility of imprisonment—whether it might imprison the defendant if he is found guilty. 407 U.S. at 42. 92 S. Ct. at 2014. The cases referred to by Petitioner refer to the prospect of imprisonment engendered by that predictive evaluation; they do not purport to extend *Argersinger. See In re Di Bella,* 518 F. 2d 955, 959 (2d Cir. 1975); *Tate* v. *Kassulke,* 409 F. Supp. 651, 658 (W.D. Ky. 1975); *Tyson* v. *New York City Housing Authority,* 369 F. Supp. 513, 521 (S.D.N.Y. 1974); *Jenkins* v. *Commonwealth,* 491 S.W. 3d 636, 637 (Ky. 1973); *Trevino* v. *State,* 555 S.W. 2d 750 (Tex. App. 1977); *People* v. *Harris,* 45 Mich. App. 217, 206 N.W. 2d 478 (1973). In fact, the court in *Di Bella* clearly stated, that it is the imposition of imprisonment that fosters the need for procedural protection. 518 F. 2d at 959.

Petitioner's contention that courts in Kentucky, Texas, New York, Ohio, Massachusetts, Michigan, Washington, Wisconsin and Oregon have interpreted the Constitution to require appointment of counsel in misdemeanor cases resulting in fines is in error. (Pet. 7) The Kentucky Supreme Court in *Jenkins* v. *Commonwealth,* 491 S.W. 2d 636 (Ky. 1973), and the Appellate Court of Texas in *Trevino* v. *State,* 555 S.W. 2d 750 (Tex. App. 1977), merely reversed the convictions of defendants who had been im-

prisoned without benefit of trial counsel. The courts in New York, Ohio and Massachusetts have definitively refused to appoint counsel for misdemeanants who are not deprived of their liberty and the cases from those jurisdictions cited by Petitioner are entirely consistent with that refusal. *Compare People* v. *Farinaro,* 36 N.Y. 2d 283, 326 N.E. 2d 819, 367 N.Y.S. 2d 258 (1975); *State* v. *Ross,* 304 N.E. 2d 396 (Ohio App. 1973); *Commonwealth* v. *Boudreau,* 285 N.E. 2d 915 (Mass. 1972) *with People* v. *Weinstock,* 80 Misc. 2d 510, 363 N.Y.S. 2d 878 (1974) (memorandum opinion); *In re Fisher,* 39 Ohio 71, 313 N.E. 2d 851 (1974); *Commonwealth* v. *Barrett,* 322 N.E. 2d 89 (Mass. App. 1975). Similarly, *Artibee* v. *Cheboygan Circuit Judge,* 397 Mich. 54, 243 N.W. 2d 248 (1976), does not demonstrate confusion by the Michigan Supreme Court. Although the court in *Artibee* applied the right to counsel of Mich. Const. art. 1, § 17 (1963) to paternity defendants, it never relied upon *Argersinger* or the federal Constitution. Indeed, Justice Coleman expressly stated that *Argersinger* was inapplicable because the trial judge had excluded confinement as a possible penalty. 397 Mich. at 60-61, 243 N.E. 2d at 251 (concurring opinion). *People* v. *Studaker,* 387 Mich. 698, 700, 199 N.E. 2d 177, 179 (1972), in which the court specifically stated that the denial of counsel in criminal cases merely precludes the imposition of a jail sentence, is the controlling Michigan case.

Petitioner's reliance upon *Tetro* v. *Tetro,* 86 Wash. 2d 252, 544 P. 2d 17 (1975), and *McInturf* v. *Horton,* 85 Wash. 2d 704, 538 P. 2d 499 (1975), as an expansive interpretation of the Constitution by the Washington court is also misplaced. (Pet. 8, 13) In *Tetro,* which held that a contemnor sentenced to jail was entitled to counsel at his contempt hearing, the court stated that the sixth amendment test is "whether the individual will be deprived of

liberty." 86 Wash. 2d at 254, 544 P. 2d at 19 (original emphasis). In *McInturf,* the court construed its own rule, not the Constitution, to require appointment of counsel for defendants charged with crimes punishable by loss of liberty whether or not they are so punished. 85 Wash. 2d at 706-707, 538 P. 2d at 500. *McInturf* is inapposite not only because it did not interpret the Constitution, but also because the Washington court retreated from that holding in *State* v. *Francis,* 85 Wash. 2d 894, 540 P. 2d 421 (1975). In *Francis,* the Washington Supreme Court held that an uncounseled conviction for an offense for which imprisonment is a possible punishment is valid if the defendant was not actually imprisoned. *Id.*

Petitioner also mistakenly seeks support from two states that adopted broader protections than that guaranteed by the Constitution, without basing those protections upon constitutional construction. (Pet. 7, 8) In *State ex rel. Winnie* v. *Harris,* 75 Wis. 2d 547, 249 N.W. 2d 791 (1977), the Wisconsin court adopted an "imprisonment-in-law" standard, which it recognized was not constitutionally required. Similarly, the Oregon court in *Brown* v. *Multnomak County,* 280 Ore. 95, 570 P. 2d 52, *rev'g,* 29 Ore. App. 917, 566 P. 2d 522 (1977), said that a state statute required appointment of counsel in cases not resulting in imprisonment.

Petitioner further contends that the Illinois Supreme Court's decision in the instant case cannot be reconciled with this court's recent right to counsel cases. (Pet. 9-11) Reconciliation is not difficult, however, since this Court frequently reiterated in those opinions the "clear constitutional rule" that counsel must be appointed before a defendant "can be validly convicted and punished by imprisonment." *Faretta* v. *California,* 422 U.S. 806, 807, 95

S. Ct. 2525 (1975). In *Ludwig* v. *Massachusetts,* 427 U.S. 618, 627, 96 S. Ct. 2781, 2876 (1976), *North* v. *Russell,* 427 U.S. 328, 335, 96 S. Ct. 2709, 2712 (1976), and *Middendorf* v. *Henry,* 425 U.S. 25, 34, 96 S. Ct. 1281, 1287 (1976), as well as in *Faretta,* this Court clearly stated that the right to counsel attaches in misdemeaor cases if a sentence of imprisonment is to be imposed. In reviewing the right to counsel at a felony probation—revocation proceeding in *Gagnon* v. *Scarpelli,* 411 U.S. 778, 790, 93 S. Ct. 1976, 1763 (1973), cited by Petitioner, this Court stated that, "the presence and participation of counsel will probably be both undesireable and constitutionally unnecessary in most revocation hearings."

Petitioner next contends that this Court mandated an inherently arbitrary pre-trial evaluation procedure that abrogates the intent of state legislatures to allow a trial court the full range of sentencing options. (Pet. 12-14) It is inconceivable, however, that this Court would deliberately mandate a procedure by which trial courts would consistently violate the fourteenth amendment in reliance upon this Court's judgment. In fact, this Court indicated in *Argersinger,* that the pre-trial evaluation was not arbitrary when it stated that a trial judge "will have a measure of the seriousness and gravity of the offense and therefore know when to name a lawyer to represent the accused before the trial starts." 407 U.S. at 40, 92 S. Ct. at 2014. Chief Justice Berger's concurring opinion in *Argersinger* similarly expressed confidence in trial courts' abilities to evaluate cases on a rational basis consistent with the Constitution:

> Trial judges sitting in petty and misdemeanor cases —and prosecutors--should recognize exactly what will be required by today's decision . . . the prediction is not one beyond the capacity of an experienced judge, aided as he should be by the prosecuting officer. 407 U.S. at 42, 92 S. Ct. at 2014.

Even prior to its rejection of Petitioner's contentions in the instant case, the Illinois Supreme Court implicitly recognized that trial judges are capable of fairly evaluating prior to trial the possibility of post-trial incarceration when it specifically authorized the predictive evaluation procedure in the right to jury trial context. *City of McLean* v. *Kickapoo Creek, Inc.,* 51 Ill. 2d 353, 282 N.E. 2d 720 (1973).

The courts of review below recognized that the pre-trial screening process required by the predictive evaluation procedure is not a departure from traditional sentencing methods. The appellate court stated that "in its predictive evaluation, the trial court is actually exercising the full range of its legislatively-afforded sentencing options by discarding some of those options in its search for the most appropriate sentencing alternative." *People* v. *Scott,* 36 Ill. App. 3d 394, 310, 343 N.E. 2d 517, 522 (1st Dist. 1976). Certainly, the existence of sentencing options did not previously preclude a trial court from eliminating sentencing alternatives due to the lack of seriousness of the offense charged. The legislatures established sentencing alternatives so that the trial courts could choose among those alternatives. It makes no difference to this statutory scheme that the right to appointed counsel depends upon these sentencing decisions.

II

PETITIONER ASKS THIS COURT TO REVIEW HIS CLAIM THAT HIS TRIAL WAS UNFAIR, BUT NEVER SPECIFIES AN ERROR UPON WHICH THIS CLAIM MAY BE BASED; THE STATE IS THUS UNABLE TO SUBSTANTIVELY RESPOND TO THIS VAGUE ASSERTION. IN ANY EVENT, THE COURT IS WITHOUT JURISDICTION TO CONSIDER THIS ISSUE BECAUSE IT HAS BEEN WAIVED.

Petitioner never alleged or argued in the state courts of review that he had been denied a fair trial. Consequently, neither the Illinois Supreme Court nor the Appellate Court of Illinois ruled upon this claim. *People* v. *Scott,* 68 Ill. 2d 269, 369 N. E. 2d 881 (1977), *aff'g,* 36 Ill. App. 3d 304, 343 N.E. 2d 517 (1st Dist. 1976). It is for this reason that Petitioner was unable to specify the lower courts' treatment of this issue as required by Supreme Court Rule 23(f). (Pet. 3-4).

In determining Supreme Court jurisdiction over issues in appeals from state courts, this Court has held that it is the obligation of each state to prescribe the jurisdiction of its appellate courts as to local, state and federal issues. *John* v. *Paullin,* 231 U.S. 583, 585 (1913). Illinois has determined that points not argued in an appellant's brief in the reviewing court are waived. Illinois Supreme Court Rules 341(e)(7), 612(j), Ill. Rev. Stat. ch. 110A, §§ 341(e)(7), 612(j) (1975). When a litigant has raised an issue for the first time in this court despite a state rule providing that issues not raised in appellants' briefs are waived, this Court has refused to review the improperly presented claim. *Beck* v. *Washington,* 369 U.S. 541, 549-553 (1962).

Moreover, as Justice Harlan stated, "The rule that in cases coming from state courts this Court may review only those issues which were presented to the state court is not discretionary but jurisdictional." *Amalgamated Food Employees Union* v. *Logan Valley Plaza, Inc.,* 391 U.S. 308, 334 (1968) (dissenting opinion).

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

May 5, 1978.

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